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7 NOODLE TIME, INC.

8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
10

11 NOODLE TIME, INC., a Florida  
12 corporation,

13 Plaintiff,

14 v.

15 BENIHIBACHI, a California  
corporation and BEHIBACHI, a  
16 California corporation

17 Defendants.  
18  
19

Case No. 2:22-cv-02320

**FIRST AMENDED COMPLAINT FOR:**

- (1) BREACH OF CONTRACT  
(SETTLEMENT AGREEMENT);  
(2) BREACH OF IMPLIED  
COVENANT OF GOOD FAITH  
AND FAIR DEALING; AND  
(3) FRAUD IN THE INDUCEMENT  
(4) ALTER EGO LIABILITY**

**DEMAND FOR JURY TRIAL**

1 Plaintiff, NOODLE TIME, INC. (“Plaintiff” or “NT”), a Florida corporation,  
2 by and through its undersigned counsel, files this complaint against Defendants  
3 BENIHIBACHI, a California corporation (“Defendant” or “Benihibachi”) and  
4 BEHIBACHI, a California corporation (collectively “Defendants”). In support of its  
5 claims, Plaintiff alleges, in on knowledge as to its own actions, and otherwise upon  
6 information and belief, as follows:

7 **STATEMENT OF CASE**

8 1. This is a civil action by Plaintiff against Defendants seeking damages  
9 sustained by Plaintiff, contractual damages, and costs and attorneys’ fees of this  
10 action, among other relief, all arising from Defendant’s breach of the settlement  
11 agreement dated May 1, 2021 between Plaintiff and Defendant  
12 (“Settlement Agreement”) and attached hereto as Exhibit A.

13 **JURISDICTION AND VENUE**

14 2. This action arises under California common law.

15 3. This Court has jurisdiction over Plaintiff’s claims against Defendants  
16 because Plaintiff and Defendant expressly agreed to submit to the jurisdiction of this  
17 Court for any dispute arising out of the Settlement Agreement which resolved a case  
18 in this District.

19 4. This Court has personal jurisdiction over Defendant because Defendants  
20 do business in the State of California and because the willful actions herein took place  
21 in the State of California and this District.

22 5. Venue is proper in this District because Plaintiff and Defendant  
23 expressly agreed, pursuant to Section 18 of the Settlement Agreement, which states  
24 that “[a]ny dispute or controversy arising out of or relating to this Agreement shall be  
25 commenced and heard only in United States District Court for the Central District of  
26 California.”



11. Upon information and belief, at all times relevant and mentioned herein, Defendants BENHIBACHI and BEHIBACHI (“Defendants”) had identical principal addresses, mailing addresses, and agents of service of process as registered with the California Secretary of State.

12. Upon information and belief, Defendant owns and/or operates, individually and/or collectively, at least five (5) food truck locations offering take-out restaurant and food catering services in Las Vegas, Nevada, and/or the following locations in California: 6423 Hollywood Blvd, Hollywood, CA 90028; 950 S. Figueroa Blvd, Los Angeles, CA 90015; 1776 Broadway, Oakland, CA 94612; 95 S. Pine Avenue, Long Beach, CA 90802; 150 Ocean Blvd, Long Beach, CA 90802; 211 Ocean Avenue 5473 Mission Blvd, Riverside, CA 92509; and (individually and/or collectively, the “Food Trucks”).

### **FACTS COMMON TO ALL COUNTS**

13. On November 20, 2020, Plaintiff filed a complaint in the United States District Court for the Central District of California against Defendant alleging trademark infringement, false designation of origin, California statutory unfair competition, trademark dilution, intentional interference with prospective economic relations, negligent interference with prospective economic relations, unfair competition, and other related claims (“Complaint”) with respect to Defendant’s unauthorized use of the of marks, names, and slogans BENIHIBACHI, BENIHIBACHI GRILL, BENIHIBACHILV, @benihibachi, @benihibachilv, [www.benihibachi.com](http://www.benihibachi.com) (individually and/or collectively “Defendant’s Marks”) in connection with the marketing, advertising, promotion, offering for sale, and/or sale of Defendant’s goods and services. The action was entitled *Noodle Time, Inc. v. Benihibachi*, Case No. 2:20-CV-10612 (the “Action”).

14. The Complaint alleges, in summary, that Defendant owned and operated the Food Trucks offering take-out restaurant and catering services located in the State

1 of California, and Defendant adopted and began using Defendant's Marks in United  
 2 States commerce since about October 2018 when Defendant opened its first Food  
 3 Truck. Plaintiff alleged that Defendant's Marks were confusingly similar to the  
 4 **BENIHANA®** Marks, and that Defendant provided, marketed, advertising,  
 5 promoted, offered for sale, and sold under Defendant's Marks goods and services that  
 6 were and are competitive to and with Plaintiff's goods and services. Further,  
 7 Defendant had at least been on constructive notice of Plaintiff's **BENIHANA®**  
 8 Marks due to the issuance by the United States Patent and Trademark Office of federal  
 9 trademark registrations for the **BENIHANA®** Marks. Plaintiff provided examples of  
 10 Defendant's use of Defendant's Marks and misuse of the **BENIHANA®** Marks.

11 15. On May 1, 2021, Plaintiff and Defendant entered into the Settlement  
 12 Agreement to resolve the underlying dispute that was the subject of the Action.

13 16. Section 5 of the Settlement Agreement (Sections (i), (iv) and (v)) state,  
 14 in part:

15 "5. No Further Use. Upon the Effective Date of this Agreement and  
 16 thereafter, Benihibachi, its principals, officers, general partners, limited  
 17 partners, shareholders, and owners, employees, agents, representatives,  
 18 parents, affiliates, divisions, subsidiaries, successors, vendees, transferees,  
 19 and/or assigns agrees to, individually and collectively on a worldwide basis,  
 immediately and/or permanently refrain from, directly and indirectly (emphasis  
 added):

20 (i) registering, attempting to register, using, renewing, maintaining,  
 21 purchasing, or acquiring any rights in **any names, trademarks,**  
 22 **trade dress, domain names, trade names, corporate names,**  
 23 **fictitious names, consisting of, in whole or in part, the Alleged**  
 24 **Infringing Marks**, the word BENI, the **BENIHANA®**  
 25 Trademarks, or any other similar word or designation, alone or in  
 26 combination with other words and/or design elements, any  
 27 colorable imitations thereof, **and/or any names or source indicia**  
 28 **confusingly similar thereto**, in connection with restaurant  
 services and/or related goods/services; and...

- 1 (iv) using in any manner, advertising, promoting, selling or offering to  
 2 sell, or authorizing others to do so, the Alleged Infringing Marks,  
 3 the word BENI, the **BENIHANA®** Trademarks, any colorable  
 4 imitations thereof, and /or any other words, phrases, trade dress,  
 5 or symbols that are confusingly similar thereto in connection with  
 6 the **BENIHANA®** Services or related goods and services; and...
- 7 (v) in connection with any food products, restaurant services and/ or  
 8 related goods and services of any kind.... displaying and/or using  
 9 in any manner, the Alleging Infringing Marks, the word BENI, the  
 10 **BENIHANA®** Trademarks, any colorable imitations thereof,  
 11 and/or any other names confusingly similar thereto, alone and/or  
 12 in combination with other words and/or design elements...”

13 17. Under the terms of the Settlement Agreement, Defendant is prohibited  
 14 from using certain marks in any manner, including the operation of its business, which  
 15 are defined as “Alleged Infringing Marks.” On information and belief, Defendant has  
 16 adopted and is wrongfully using one or more of the “Alleged Infringing Marks”  
 17 identified in the Settlement Agreement. For example, Defendant is using a Food  
 18 Truck with “BENIHIBACHI” emblazoned on the entire side of the vehicle, to identify  
 19 Defendant’s restaurant services. A photograph of this Food Truck, taken in Long  
 20 Beach in February 2022 is attached hereto as Exhibit C. The Food Truck advertises  
 21 Defendant’s several Benihibachi locations: Hollywood, Fairfax, Downtown, Long  
 22 Beach, Oakland and San Jose. On information and belief, Defendant operates  
 23 multiple Food Trucks not only in California, but in multiple states, including Nevada.  
 24 Defendant’s Food Truck that is blatantly operating in Long Beach is just one instance  
 25 of Defendant’s brash use and display of the Alleged Infringing Marks in contravention  
 26 of both the express terms, and the spirit and intent of the Settlement Agreement.

27 18. In addition, on information and belief, Defendant is using at least one  
 28 mark, “BEHIBACHI,” which is confusingly similar to the prohibited mark,  
 “BENIHIBACHI,” in connection with its continued operation of the Food Trucks.

1           19. Defendant's uses of BENIHIBACHI and BEHIBACHI are in breach of  
2 Sections 5(i), 5(iv) and 5(v) of the Settlement Agreement, among others. The word  
3 "BEHIBACHI" is confusingly similar to the word "BENIHIBACHI," which  
4 Defendant is clearly prohibited from using pursuant to the Settlement Agreement. In  
5 fact, the term "BENIHIBACHI" still appears in search engine results and linking to  
6 BEHIBACHI, which prevents Plaintiff from obtaining the benefits of the Settlement  
7 Agreement.

8           20. Due to Defendant's actions and breach of the Settlement Agreement, its  
9 covenant of good faith and fair dealing, and commission of fraud in the inducement,  
10 on or about January 3, 2022, counsel for Plaintiff sent a Notice of Settlement Non-  
11 Compliance and Breach to counsel for Defendant in accordance with Section 13 of  
12 the Settlement Agreement, detailing Defendant's breaches and offending actions.  
13 Defendant did not cure its breaches or cease using the Alleged Infringing Marks,  
14 causing Defendant's Material Breach under the Settlement Agreement, and  
15 necessitating this action.

16           21. In addition to other relief, Section 13 of the Settlement Agreement  
17 obligates Defendant to pay two thousand five hundred dollars (\$2,500) to Plaintiff,  
18 plus prejudgment and post judgment interest, for each Material Breach, as liquidated  
19 damages.

20                                   **COUNT 1: BREACH OF CONTRACT**

21  
22           22. Plaintiff hereby repeats, realleges, and incorporates by reference, as  
23 though fully set out herein, the allegations contained in Paragraphs 1 through 18  
24 above.

25           23. The Settlement Agreement is a binding and enforceable contract between  
26 Plaintiff and Defendant, which is attached hereto as Exhibit A.

27           24. Plaintiff performed all or substantially all of the actions that the  
28 Settlement Agreement required Plaintiff to perform.



1           25. Defendant breached the Settlement Agreement by failing to refrain from  
2 using the Alleged Infringing Marks (including, without limitation, BENIHIBACHI  
3 and BEHIBACHI) on its Food Trucks, and in its Internet and social media listings,  
4 among other things.

5           26. Defendant continues to breach the Settlement Agreement by refusing to  
6 comply with the prohibitions set forth, including in Section 5 of the Settlement  
7 Agreement, which obligates Defendant to cease using the Alleged Infringing Marks  
8 and any mark similar thereto that may cause consumer confusion as to the owner of  
9 the Food Truck, or the provider of the restaurant goods or services.

10           27. Defendant's breach of the Settlement Agreement is a substantial factor  
11 in causing Plaintiff's harm. Defendant's conduct has damaged, and continues to  
12 damage Plaintiff the extent that Defendant's (and/or its affiliates' or business  
13 partners') goods and/ or services are offered improperly in connection with the  
14 **BENIHANA®** Marks, and do not conform to Plaintiff's quality standards, such non-  
15 conformity has injured or is likely to injure Plaintiff's reputation and goodwill.

16           28. As a result of Defendant's conduct and breach of the Settlement  
17 Agreement, Plaintiff has been damaged in an amount to be determined at trial.

18           29. Plaintiff has been and will continue to be irreparably injured by  
19 Defendant's conduct. Plaintiff cannot be adequately compensated for these injuries  
20 by monetary remedies alone, and Plaintiff has no adequate remedy at law for  
21 Defendant's material breach of the Settlement Agreement. Plaintiff is therefore  
22 entitled to injunctive relief against Defendant, and, after trial, to recover any damages  
23 proven to have been caused, or any profits of Defendant that have been earned  
24 unjustly, by reason of Defendant's acts.

25  
26           **COUNT 2: BREACH OF THE IMPLIED DUTY OF GOOD FAITH AND**  
27                                   **FAIR DEALING**  
28



1           30. Plaintiff hereby repeats, realleges, and incorporates by reference, as  
2 though fully set out herein, the allegations contained in paragraphs 1 through 26  
3 above.

4           31. California law implies a covenant of good faith and fair dealing that  
5 requires each party to the contract to not take actions that deprive the other party of  
6 the benefits of the contract.

7           32. The Settlement Agreement is a binding and enforceable contract between  
8 Plaintiff and Defendant, which contains an implied covenant that the parties will act  
9 in good faith with respect to the performance of their contractual obligations, and will  
10 not frustrate the other party's rights to the benefits of the contract at issue.

11           33. Defendant breached the implied covenant of good faith and fair dealing  
12 in entering into and its performance of the Settlement Agreement by, among other  
13 things, using the mark "BEHIBACHI." Although the Settlement Agreement did not  
14 expressly state that Defendant could not use the specific word "BEHIBACHI,"  
15 Defendant's use of this mark that is extremely similar to, and only two letters different  
16 from "BENIHIBACHI," is conduct that frustrates Plaintiff's rights and benefits in the  
17 Settlement Agreement.

18           34. By executing the Settlement Agreement and dismissing the Action  
19 against Defendant, Plaintiff relied on various promises not only set forth in the  
20 Settlement Agreement, but also on the implied covenant of good faith and fair dealing,  
21 that Defendant would stop displaying or using any mark that had the same qualities  
22 as Defendant's marks that confused consumers, diluted the **BENIHANA®** Marks,  
23 and caused damage, injury and harm to Plaintiff's restaurant business.

24           35. Defendant's conduct in using the mark BEHIBACHI continues to  
25 confuse consumers who mistakenly believe that Defendant's goods and services are  
26 approved or endorsed by, or affiliated with Plaintiff, to Plaintiff's injury and harm.  
27 Because the Settlement Agreement cannot contemplate every permutation of every  
28 Alleged Infringing Mark that Defendant agreed to stop using, Plaintiff relied on

1 Defendant's implied covenant of good faith and fair dealing to ensure that Defendant  
2 would not use any mark that is prohibited, or confusingly similar to a prohibited mark.  
3 Defendant breached its implied covenant by, among other things, using the mark  
4 "BEHIBACHI" to wrongfully continue to trade on the goodwill and reputation of  
5 Plaintiff, to Plaintiff's detriment.

6 36. As a result of Defendant's conduct of continuing to use the Alleged  
7 Infringing Marks and marks confusingly similar to the Alleged Infringing Marks,  
8 Defendant breached its covenant of good faith and fair dealing implied in the  
9 Settlement Agreement.

10 37. As a direct and proximate result of such breach, Plaintiff has been  
11 damaged in an amount to be determined at trial.

### 12 13 **COUNT 3: FRAUD IN THE INDUCEMENT**

14 38. Plaintiff hereby repeats, realleges, and incorporates by reference, as  
15 though fully set out herein, the allegations contained in paragraphs 1 through 34  
16 above.

17 39. On information and belief, at the time Defendant executed the Settlement  
18 Agreement, Defendant did not intend to honor its contractual promises when they  
19 were made. Margarita Escobedo, the owner of Defendant, signed the Settlement  
20 Agreement, and represented and warranted in the Settlement Agreement (Section 15)  
21 that she was duly authorized to execute the Settlement Agreement on behalf of  
22 Defendant, and to bind Defendant to the terms, conditions, provisions, duties and  
23 obligations set forth in the Settlement Agreement.

24 40. Defendant's actions, including blatantly using one or more Food Trucks  
25 prominently displaying the mark "BENIHIBACHI" in Long Beach in February of  
26 2022 (evidenced in Exhibit C), demonstrate that when entering into the Settlement  
27 Agreement, Defendant had no present intent to perform on its promises that it would  
28

1 stop using the Alleged Infringing Marks or any names or source indicia confusingly  
2 similar thereto.

3 41. Defendant fraudulently induced Plaintiff to enter into the Settlement  
4 Agreement and dismiss the Action by promising in the Settlement Agreement, among  
5 other things, not to use the Alleged Infringing Marks, yet knowingly and intentionally  
6 continued, and continues using the Alleged Infringing Marks in commerce to further  
7 damage Plaintiff's business, confuse restaurant consumers, and cause Plaintiff to  
8 suffer lost profits.

9 42. Further, Defendant's use of the Alleged Infringing Marks in connection  
10 with the sale, offering for sale, distribution or advertising of its goods and services is  
11 continuing to injure Plaintiff's business reputation, cause dilution of the distinctive  
12 value of the **BENIHANA®** Marks, all to Plaintiff's irreparable harm.

13 43. Defendant made promises of future conduct (set forth in Section 5 of the  
14 Settlement Agreement, "No Further Use") without any present intent to perform.

15 44. Defendant concealed and misrepresented to Plaintiff that Defendant had  
16 no intention of complying with the Settlement Agreement and no intention of  
17 discontinuing its use of the Alleged Infringing Marks in commerce.

18 45. Plaintiff reasonably relied on Defendant's promises and entered into the  
19 Settlement Agreement, and performed the actions required by the Settlement  
20 Agreement in good faith, including, without limitation, dismissing the Action against  
21 Defendant.

22 46. As a direct and proximate result of Defendant's fraud in the inducement,  
23 Plaintiff has been damaged in an amount to be determined at trial.

24  
25 **COUNT 4: ALTER EGO LIABILITY**

26 47. Plaintiff hereby repeats, realleges, and incorporates by reference, as  
27 though fully set out herein, the allegations contained in Paragraphs 1 through 46  
28 above.



- 1 (c) An order permanently enjoining and restraining Defendants from  
2 continuing to breach the Settlement Agreement.
- 3 (d) A judgment against Defendants which awards Plaintiff all profits received  
4 by Defendants from its misuse of the **BENIHANA®** Marks and all profits  
5 received by Defendant and all damages sustained by Plaintiff on account of  
6 Defendants' false suggestion or connection with Plaintiff through the use of  
7 the **BENIHANA®** Marks and/or the Alleged Infringing Marks.
- 8 (e) \$2,500 for each Material Breach committed by Defendants, plus  
9 prejudgment and post judgment interest.
- 10 (f) All costs and disbursements in this action, pursuant to 15 U.S.C. §§ 1114  
11 and 1117, California Code of Civil Procedure §1033.5. and any other  
12 applicable law or statute; and
- 13 (g) Any other relief, including temporary restraining orders and preliminary  
14 injunctions, that the Court finds warranted and just.

15  
16 Respectfully submitted,

17 DATED: May 23, 2022

GARCIA RAINEY BLANK & BOWERBANK LLP

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19  
20 By */s/ Jeffrey M. Blank*

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22 \_\_\_\_\_  
23 JEFFREY M. BLANK  
24 NORMA V. GARCIA  
25 Attorneys for Plaintiff  
26 Noodle Time, Inc.  
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28

**DEMAND FOR JURY TRIAL**

Pursuant to Fed.R.Civ.P.38(b) and Local Rule 38-1, Plaintiff hereby  
demands a trial by jury on all issues so triable in this action.

DATED: May 23, 2022                      GARCIA RAINEY BLANK & BOWERBANK LLP

By    */s/ Jeffrey M. Blank*

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